Supreme Court, U. S.
FILED
MAY 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1515

PACIFIC NORTHWEST BELL
TELEPHONE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN N. RUPP
DONALD J. HAGEN of
SCHWEPPE, DOOLITTLE, KRUG,
TAUSEND & BEEZER

Counsel for Petitioner

1600 Peoples National Bank Bldg.
Seattle, Washington 98171
(206) 223-1600

CRAFTSMAN PRESS — WORD PROCESSING, SEATTLE

SUBJECT INDEX

	Page
I. Opinions Below	1
II. Jurisdiction	2
III. Statutory Provisions and Regulations Involved	2
IV. Questions Presented	3
V. Statement of the Facts.	4
VI. Reasons for Granting the Writ	11
1. The Admiralty Acts and Waiver of Immunity	12
2. PNB's Cable Permit and Clause (g)	16
3. Conflict in the Circuits	19
4. The Government's Dominant Navigational Servitude	20
VII. Conclusion	23
Appendix A	A-1
Appendix B	A-4
Appendix C	A-11

TABLES OF AUTHORITY

Table of Cases

Boston Edison v. Great Lakes Dredge & Dock Co., 423 F.2d 891 (1st Cir. 1970)	19

	Page
Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945)	13,14
De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971)	20
Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976)	20
Lakewood S.S. Co. v. Superior Water, Light & Power Co., 88 F.2d 895 (7th Cir. 1937)	15
Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129 (1936)	19
Michigan Bell Tel. Co. v. Copper Range R.R., 355 F.2d 678 (6th Cir. 1966)	15
New Jersey Bell Tel. Co. v. Standard Oil Co. of New Jersey, 88 F. Supp. 806 (S.D.N.Y. 1949)	15
P. Sanford Ross, Inc. v. Public Serv. Corp. of New Jersey, 42 F.2d 79 (3d Cir. 1930)	15
Paducah Sand & Gravel Co. v. Central Home Tel. & Tel. Co., 209 Ky. 756, 273 S.W. 481 (1925)	15
Postal Tel. Cable Co. v. P. Sanford Ross, Inc., 221 F. 105 (E.D.N.Y. 1915)	15
United States v. United Continental Tuna Corp., 425 U.S. 164, 96 S. Ct. 1319 (1976)	14

Statutes

	Page
33 C.F.R. § 130(c)(2)(vii) (1974)	8
33 C.F.R. §§ 209.110 - 209.335 (1974)	5
33 C.F.R. § 209.130(c)(2)(vii) (1974)	2
28 U.S.C. § 1254(1)	2
33 U.S.C. § 1	2,5,10-11,17
46 U.S.C. §§ 741-752	7,12
46 U.S.C. § 742	2,9,13
46 U.S.C. § 746	2,14
46 U.S.C. § 781	2,9
46 U.S.C. §§ 781 - 790	7,13
46 U.S.C. § 789	2,14

Other Authority

Sir Richard Steele, The Spectator No. 509, Oct. 14, 1712	17

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. .....

PACIFIC NORTHWEST BELL
TELEPHONE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Pacific Northwest Bell Telephone Company, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered herein on February 4, 1977.

I.

OPINIONS BELOW

The opinion of the District Court for the Western District of Washington is reported at

378 F. Supp. 297 (1974). The opinion of the Court of Appeals for the Ninth Circuit is reported at 549 F.2d 1313 (1977). Those opinions are printed herein as Appendix A and Appendix B, respectively.

II.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 4, 1977. This petition for certiorari is filed less than 90 days from that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Statutory provisions involved are: 33 U.S.C. § 1; 46 U.S.C. § 742; 46 U.S.C. § 746; 46 U.S.C. § 781; 46 U.S.C. § 789; and 33 C.F.R. § 209.130(c)(2)(vii) (1974).

All the foregoing are printed in pertinent part herein as Appendix C.

IV.

QUESTIONS PRESENTED

Pacific Northwest Bell Telephone Company (hereafter "PNB") brought an admiralty suit under both the Suits in Admiralty Act and the Public Vessels Act to recover its damages resulting from an injury to PNB's underwater telephone cable caused by the negligence of the U.S. Coast Guard in placing a race-course buoy in Lake Washington at Seattle. The District Court entered judgment for PNB. The Court of Appeals reversed. The questions involved are:

1. Whether the Public Vessels Act and the Suits in Admiralty Act waive sovereign immunity from maritime tort liability, making the United States liable for its negligent injury to the cable if a private person would be liable for causing the same injury.

2. Whether the Secretary of the Army can, by regulation, reestablish sovereign immunity so that the United States is not liable for tortious injury to the cable even though a private person would be liable for causing the same injury.

3. Whether the Secretary of the Army's regulation, which purports to immunize the Government from tort liability, bears any reasonable relation to the Secretary's authority to make navigable waters safe for navigation.

4. Whether the United States' dominant navigational servitude immunizes it from liability for tortious injury to submarine cables placed in navigable waters in spite of the waiver of sovereign immunity from maritime tort established by the foregoing admiralty statutes.

V.

STATEMENT OF THE FACTS

The case was appealed from a summary judgment, and the facts are uncontroverted.

The petitioner is a regulated utility which has a statutory duty to provide telephone service to the public in the Seattle area (R. 1-2, 7). Lying along the eastern edge of Seattle is Lake Washington, a navigable body of water about 20 miles long and 1-1/2 miles wide. Mercer Island

is an inhabited island in that lake. To provide telephone service between Seattle and Mercer Island, one must go over or under the water. Submarine cables are the only reasonable means of spanning the 1-1/2-mile distance. One of the submarine telephone cables needed to serve Mercer Island from Seattle was placed under the lake in 1965 (R. 2, 8).

Since such a cable is a structure which might affect the navigable capacity of the waters, PNB had to obtain, and did obtain, from the Army Corps of Engineers, a permit for the cable (R. 2, 8). 33 U.S.C. § 1, et seq.; 33 C.F.R. §§ 209.110 - 209.335 (1974).[1]

Thereafter, the location of the cable was described in the official "Local Notice to Mariners" issued by the U.S. Coast Guard, and its

---

[1] These regulations prescribe a number of non-negotiable permit conditions to which the permittee must accede if it wishes to place a structure in navigable waters. The Corps of Engineers has no authority to waive or modify any of the required permit clauses. One of these clauses is the subject of this petition and is addressed in detail later.

location was designated as a "cable area" on the official government chart of Lake Washington, published by the National Oceanic and Atmospheric Administration, the most recent revision of which was issued a full 6 months before the incident here involved (R. 3, 8).

In the summer of 1972, in connection with the annual Seattle celebration called "Seafair," there was to be a speedboat race. The race course was laid out in Lake Washington between Seattle and Mercer Island (R. 3-4, 8). The U.S. Coast Guard undertook the task of placing the large buoys used to mark the course. The Coast Guard buoy tender, "Fir", was assigned to this duty (R. 4, 8). The promoters of the race furnished the master and crew of the "Fir" with a diagram showing where the buoys were to be placed. Id. This was not the official chart which all navigators use; it was simply the promoters' map. Id. It did not correctly show the cable area. Id. The master and crew of the "Fir" did not consult the Notices to Mariners nor did they

examine the official N.O.A.A. chart (R. 4, 8, 49-50).

The "Fir" placed race-buoy "Charlie" right in the cable area. In maneuvering the buoy anchor, the crew fouled and broke the telephone cable. It cost PNB $56,000 to repair the damage (R. 85-86).

PNB timely filed a claim for its damages (R. 4-5, 8). When the Coast Guard refused to allow it, PNB instituted in the U.S. District Court for the Western District of Washington a suit in admiralty under the Suits in Admiralty Act (46 U.S.C. §§ 741-752) and the Public Vessels Act (46 U.S.C. §§ 781-790) asserting that the United States was liable in tort for the damages caused by the Coast Guard's negligence. Discovery ensued, and, in due course, PNB moved for summary judgment on the issue of liability. (In the course of the proceedings the amount of damages was stipulated, so the summary judgment decided the whole case.)

The Government did not seriously contest the issue of the Coast Guard's negligence. (Indeed, how could it? Those people who did not bother to look at the chart and who put a big anchor in a marked cable area that summer day were not feckless amateurs -- they were the U.S. Coast Guard!) The Government's basic position was that it was not liable for the Coast Guard's acts even if they were negligent, or grossly negligent, or even willful and deliberate. Why not? Because when PNB laid the cable in 1965, it had been required to obtain, and it did obtain, a permit from the Army Corps of Engineers. One of the non-negotiable provisions required to be inserted in each permit by the regulations cited above is at the core of this petition, and for convenience has been called "Clause (g)" throughout this litigation.[2] Clause (g) reads as follows:

> (g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized

[2] Clause (g) is required by 33 C.F.R. § 130(c)(2)(vii) (1974).

> which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

That clause appears in the 1965 permit here involved. This means, said the Government, that the Coast Guard could damage or destroy the cable with complete impunity no matter how grossly negligent it may have been.

The Government also claimed immunity under what it called its "dominant navigational servitude."

The District Court rejected the Government's arguments and held that Congress had unconditionally waived sovereign immunity by enacting the Suits in Admiralty Act, as amended (46 U.S.C. § 742), and the Public Vessels Act (46 U.S.C. § 781), and that the continued use of Clause (g) by the Secretary of the Army was an unlawful attempt by an administrative agency to re-create the sovereign immunity which had been clearly and unequivocally waived by Congress. Thereupon, on August 24, 1974, the District Court entered

judgment for PNB against the United States for PNB's damages in the stipulated amount of $56,000.

The Government appealed to the Court of Appeals for the Ninth Circuit. That court held that Clause (g) did indeed exculpate the Government from liability, and hence it reversed the judgment of the District Court.

The Court of Appeals accepted the District Court's finding of negligence. It agreed, however, with the Government's position that, by putting Clause (g) in the 1965 cable permit, the Secretary of the Army had made the Coast Guard immune from any liability. It held that this immunity was not the sovereign immunity which Congress had waived by the Suits in Admiralty Act and the Public Vessels Act. It held that the exculpatory Clause (g) was "relevant to the regulatory purpose and falls within the regulatory power" of the Secretary of the Army, that is, the Secretary's power under 33 U.S.C. § 1 to make:

> [R]egulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the

> public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, ...

The Court of Appeals also said that in dealing with navigable waters the Secretary of the Army is like a landowner. A landowner, it said, does not have to grant an easement across his property and, if he does so, he is entirely at liberty to impose any conditions that he wants to impose; and it went on to liken the permit to a contract freely entered into by the parties.

VI.

REASONS FOR GRANTING THE WRIT

The Court of Appeals was incorrect in its decision, and the case should be reviewed by this Court because:

1. The case presents these serious and far-reaching questions:

(a) Whether an administrative agency which has only those powers delegated to it by Congress, may, by regulation, create or re-create an immunity from tort liability

which immunity Congress has expressly abrogated;

(b) Whether the immunity which the Secretary of the Army has purported to create bears any relation to the Secretary's authority to insure the safety of navigable waters.

2. It appears that a conflict exists among the circuits as to the effect of the exculpatory clause in the Army permits.

3. The questions here presented have never been considered by this Court -- the case is one of first impression here.

4. The decision of the Court of Appeals is not consistent with principles laid down by this Court.

5. The question involved is of direct concern to the thousands of citizens all over the United States who must have these Army permits to place structures in navigable waters.

1. The Admiralty Acts and Waiver of Immunity

By passage of the Suits in Admiralty Act, 46 U.S.C. § 741 et seq., and the Public Vessels

Act, 46 U.S.C. § 781 et seq.,[3] Congress waived sovereign immunity from liability for maritime tort. Under the Public Vessels Act the United States is liable "for damages caused by a public vessel of the United States," 46. U.S.C. § 781,[4] and under the Suits in Admiralty Act, as amended in 1960, the United States is liable for damages "[I]n cases where if such vessel were privately owned or operated . . . or if a private person or property were involved, a proceeding in admiralty could be maintained. . . ." 46 U.S.C. § 742. The language could not be clearer.

Both acts specifically address exemptions and limitations of liability and both reserve to the United States only "the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers,

---

[3] Proceedings under the Public Vessels Act are to be in accordance with the Suits in Admiralty Act so far as they are not inconsistent. 46 U.S.C. § 782.

[4] This includes liability for the negligence of a ship's officer. See Canadian Aviator, Ltd., infra.

operators, or agents of vessels." 46 U.S.C. §§ 746 and 789.

This Court has unequivocally stated that the United States is now liable for torts of a public vessel if a private person would be liable for the same injury:

> [W]e hold that the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel in rem) as is imposed by the admiralty law on the private shipowner. . . .

Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 228 (1945). This Court recently stated that the purpose of the 1960 amendment to the Suits in Admiralty Act, which also subjects the Government to liability if a private person would be liable for the same injury, was to bring "within the suits in Admiralty Act whatever category of claims involving public vessels was beyond the scope of the Public Vessels Act." United States v. United Continental Tuna Corp., 425 U.S. 164, 96 S. Ct. 1319, 1328 (1976).

Without exception, the reported case law has allowed rightful occupiers of navigable waters

to recover damages from private persons who negligently damage underwater cables, pipelines, etc.[5]

The statutes and the holdings of this Court are not ambiguous: if a private person would be liable to PNB under general maritime principles for damage caused, so is the United States.

Under the holding of the Court of Appeals, however, it makes no difference that a private person would be liable in admiralty to PNB for negligently dragging an anchor in a cable area and damaging PNB's submarine cable, and it makes no difference how grossly negligent the United

---

[5] See, e.g., Paducah Sand & Gravel Co. v. Central Home Tel. & Tel. Co., 209 Ky. 756, 273 S.W. 481 (1925); Lakewood S.S. Co. v. Superior Water, Light & Power Co., 88 F.2d 895 (7th Cir. 1937). The latter case holds that a cable laid by permit under 33 U.S.C. § 403 does not constitute an obstruction to navigation. 88 F.2d at 898. See, also, Postal Tel. Cable Co. v. P. Sanford Ross, Inc., 221 F. 105 (E.D.N.Y. 1915); P. Sanford Ross, Inc. v. Public Serv. Corp. of New Jersey, 42 F.2d 79 (3d Cir. 1930); Michigan Bell Tel. Co. v. Copper Range R.R., 355 F.2d 678 (6th Cir. 1966); New Jersey Bell Tel. Co. v. Standard Oil Co. of New Jersey, 88 F. Supp. 806 (S.D.N.Y. 1949).

States was. The court held that the Government is simply not liable for its negligent conduct.

2. PNB's Cable Permit and Clause (g)

PNB is far from alone in being affected by Clause (g). Before any cable, pipeline or the like can be placed in navigable waters, a permit must be obtained from the U.S. Army Corps of Engineers. Thousands of telephone and telegraph cables, electrical conduits, water and gas pipelines and other structures cross under lakes, rivers and other navigable waters throughout the United States, to say nothing of the bridges, piers and other structures requiring such permits. By the Secretary's regulation every one of those permits contains the exculpatory Clause (g). Therefore, all these structures are potentially affected by the ruling of the court below.

The Court of Appeals' statement that PNB and all the other people who have permits from the Army are free contracting parties who have by choice willingly accepted the Secretary's Clause (g) is harsh, unrealistic and inaccurate.

They have no choice at all. Thus, in the instant case PNB had a statutory duty to provide telephone service to the people of Mercer Island. To extend telephone lines to an island, one must go over or under water. To do so, one must obtain a permit from the Army. Neither the Army people nor the permittee may negotiate about Clause (g); the Secretary's regulation requires its presence in every permit. The permittee's "free choice" is that immortalized in the business practice of the celebrated livery-stable keeper, Tobias Hobson, of which practice Sir Richard Steele (The Spectator No. 509, Oct. 14, 1712) tells us:

> From whence it became a proverb, when what ought to be your election was forced upon you, to say, Hobson's Choice.

Moreover, Clause (g) is in excess of the Army Secretary's authority to prescribe regulations. The clause does not purport to regulate anything. It does not assign any duties either to the United States or to the permittee. Clause (g) has nothing to do with the Secretary of the Army's duty under 33 U.S.C. § 1 to prescribe regulations to control navigation and insure its

safety. The only function of Clause (g) is to immunize the United States from the consequences of its own acts, no matter how egregious or negligent. Even absent the waivers of sovereign immunity in the Admiralty Acts, therefore, Clause (g) is invalid as having nothing to do with navigation safety. In requiring it, the Secretary has exceeded his authority.

Of course, Congress did waive sovereign immunity for maritime tort. Therefore, in holding that Clause (g) is applicable here and exculpates the Government, the Court below has arbitrarily carved out a single, special class of persons who cannot recover against the United States for maritime tort under any circumstances, to-wit: all those persons, companies, utilities, dock-owners, and the like who must obtain U.S. Army Corps of Engineers permits in order to place lawful structures in navigable waters. This is so because the Corps is required by regulation to put Clause (g) in every one of these permits.

Clause (g) plainly and simply is an administrative device -- "administrative legislation" --

designed to establish sovereign immunity from maritime tort where Congress has expressly waived immunity. This Court held such regulations to be a "mere nullity" in Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 134 (1936).

3. Conflict in the Circuits

Moreover, there now appears to be a conflict in the circuits regarding the extent to which Congress has waived sovereign immunity in the Admiralty Acts. The decision below aligns the Ninth with the First Circuit in upholding Clause (g), although under a different rationale. The First Circuit erroneously imported the discretionary function exemption of the Federal Tort Claims Act into the Suits in Admiralty Act, even though the two acts by their own terms are mutually exclusive. See Boston Edison v. Great Lakes Dredge & Dock Co., 423 F.2d 891 (1st Cir. 1970).

While no other appellate court has directly addressed Clause (g), most probably the Second Circuit, and especially the Fifth Circuit, would invalidate the clause, consistent with prior

holdings of this Court. See Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976), in which the 1960 amendment to the Suits in Admiralty Act waiving sovereign immunity was given its "plain and ordinary meaning." 531 F.2d at 1148-49. And see De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971), which held that Congress intended "to assimilate the Government to the private person in relation to any or all transactions giving rise to liability in the Admiralty." (Emphasis added.) 451 F.2d at 145.

4. The Government's Dominant Navigational Servitude

The Government's "dominant navigational servitude" argument and the Court of Appeals' "landowner" analogy are both faulty, and for the same reason. The Court of Appeals points out that a landowner has an absolute right to deny others the use of his land and that hence, if he allows another to use it, he may attach to that permission any conditions, however bizarre, that he may wish. Then that court goes on and says that, in dealing with navigable waters, the

Secretary of the Army is like a landowner. But the Secretary of the Army's authority is by no means as broad as that of a landowner. It is carefully limited to matters embraced in the power to control, protect and regulate navigation. The Secretary has the authority to require permits and to place conditions in those permits, but, as Congress has plainly stated, those conditions must have some reasonable bearing on navigation. A condition designed solely to shield the Government from its own negligence is of no help to navigation -- all it does is save the Government money.

The Government's "dominant navigational servitude" argument is equally faulty. The argument goes this way: if, after PNB's cable was placed in the lake, the needs of navigation should require that the cable be relocated or removed, the Government could require PNB to relocate or remove the cable without any compensation. PNB agrees that that is so. Then, however, the Government goes on to reason that, since it could compel removal or relocation, it follows that it

also has a perfect right to destroy or injure the cable, negligently or even intentionally, without any liability, even though the cable did not obstruct navigation. (The Government really says this in its brief in the Court of Appeals!) Thus, the Government would say that if A parks his car in B's driveway, B can compel A to remove the car; therefore B can also, without asking A to move the car, drop a wrecking ball on it, or set it on fire, without any liability to A. But the Government is wrong about this; the second proposition does not follow from the first. The Government's "servitude" is limited to its right to control and protect navigation. The Government's designation and marking of a cable area is plainly an exercise of that right; but negligently dragging an anchor around in that cable area is not.

PNB readily concedes that if its cable constituted an obstruction to navigation, it could be ordered to move or remove the cable without compensation for a "taking" of its property under the Fifth Amendment. But PNB is not asserting

a Fifth Amendment right of recovery; rather, it is asserting a claim for maritime tort for injury to a cable which was rightfully occupying the bed of Lake Washington and which was not an obstruction to navigation.

VII.

CONCLUSION

If Congress had wished to disallow damages for negligent injury to underwater structures, it could and would have written an exception into the Admiralty Acts. The Secretary of the Army does not have the right to do what Congress plainly forbade. Nor does the Secretary of the Army's authority to make regulations for the safety of navigation authorize him to immunize government agencies from liability for their negligent conduct.

JOHN N. RUPP
DONALD J. HAGEN of
SCHWEPPE, DOOLITTLE, KRUG,
TAUSEND & BEEZER

Counsel for Petitioner

APPENDIX A

PACIFIC NORTHWEST BELL TELEPHONE COMPANY, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 760-73C2.

United States District Court, W. D. Washington.

July 9, 1974.

ORDER GRANTING PLAINTIFF'S FIRST PARTIAL SUMMARY JUDGMENT MOTION

BEEKS, District Judge.

1. Procedural. This matter came on regularly for hearing on June 20, 1974, upon the motion of plaintiff, Pacific Northwest Bell Telephone Company, for partial summary judgment against defendant, United States of America, pursuant to Federal Rule of Civil Procedure 56(a) on the legal question raised by defendant's Second Defense as set forth in its answer. Plaintiff was represented in Court by two of its attorneys, Donald J. Hagen and David G. Knibb, of Schweppe, Doolittle, Krug, Tausend, Beezer & Beierle. Defendant was represented in Court by one of its attorneys, Richard J. Beaver, of the Admiralty and Shipping Section, U.S. Department of Justice.

2. Admitted Facts. No genuine issue of material fact exists. The admitted facts material to this motion as presented to the Court and summarized herein from the pleadings show that Pacific Northwest Bell Telephone Company (hereafter

called "PNB") obtained a permit on April 12, 1965, from the Seattle District of the U. S. Army Corps of Engineers, pursuant to 33 U.S.C. § 403 to lay a submarine telephone cable in navigable waters under Lake Washington. A true and correct copy of this permit was admitted into evidence without objection as Exhibit "3". PNB's cable was laid and spliced by approximately May 1, 1965. While engaged in setting buoys for the 1972 Seafair Hydroplane Race, the U.S. Coast Guard Vessel FIR, as a part of its regular duties to ensure navigational safety, damaged PNB's cable with a buoy anchor on or about July 26, 1972. PNB alleges that this damage was caused by defendant's negligence. Clause (g) in the 1965 permit stated:

> That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

PNB's timely claim to the Coast Guard for damages to its cable was denied September 7, 1973, on the basis of Clause (g), and this clause is now pleaded by the United States as its Second Defense.

3. Issue. The question presented is whether Clause (g) in the 1965 permit immunizes the United States from liability for the alleged negligence of the U.S. Coast Guard in causing damage to PNB's cable.

[1,2] 4. Conclusions. Clause (g) is invalid both under the Public Vessels Act, 46 U.S.C. § 781, and under the 1960 amendments to

the Suits in Admiralty Act, 46 U.S.C. § 742, which were designed to subject the United States to maritime tort liability to the same extent as a private person. DeBardeleben Marine Corp. v. United States, 451 F.2d 140, 145 (5th Cir. 1971). Clause (g) was promulgated by regulation. 33 C.F.R. § 209-130(c)(2)(vii). A regulation beyond the scope of, or in conflict with, statutory authority is invalid. Mannhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134, 56 S.Ct. 397, 80 L.Ed. 528 (1936).

[3] Boston Edison v. Great Lakes Dredge and Dock Co., 423 F.2d 891 (1st Cir. 1970) relied upon by the Government to uphold Clause (g) is inapplicable because it did not consider the effect of these 1960 amendments to the Suits in Admiralty Act upon the government's claim of sovereign immunity (based in that case, as here, upon a permit clause). The government's dominant navigational servitude, see United States v. Virginia Electric Co., 365 U.S. 624, 627-628, 81 S.Ct. 784, 5 L.Ed.2d 838 (1961) similarly does not immunize the government from liability for negligent performance of a statutory duty. Compare Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939 (1915) with Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

5. Order. Based upon the foregoing it is hereby ORDERED that:

Defendant's Second Defense, based upon Clause (g) in the 1965 permit, is dismissed.

* * *

APPENDIX B

Before MERRILL and CHOY, Circuit Judges, and GRAY,* District Judge.

MERRILL, Circuit Judge:

The United States has taken this appeal from judgment of the district court, 378 F.Supp. 297 (W.D. Wash. 1974), awarding the sum of $56,000 to Pacific Northwest Bell Telephone Company (Bell) for damages suffered by a submarine telephone cable on the bed of Lake Washington, a navigable body of water near Seattle. The cable had been placed in Lake Washington pursuant to a permit issued by the United States Army Corps of Engineers. It was fouled by the anchor of a buoy placed there by the United States Coast Guard. By regulation and by the language of the permit, the United States is relieved of liability for damage or injury caused by or resulting from operations undertaken by the United States for the conservation and improvement of navigation. The question presented by this appeal is whether the regulation and language of the permit relieving the United States from liability are inconsistent with and invalidated by the waiver of sovereign immunity provided by the Public Vessels Act and the Suits in Admiralty Act. The district court held the regulation and permit condition to be invalid. We reverse.[1]

The Secretary of the Army has been given authority generally to prescribe regulations regarding navigable waters:

---

* Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

1. We thus find ourselves in agreement with the result in Boston Edison Co. v. Great Lakes Dredge & Dock Co., 423 F.2d 891 (1st Cir. 1970).

> "It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department."

33 U.S.C. § 1. By the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, Congress among other things expressly prohibited the creation of any obstruction to the navigable capacity of any of the waters of the United States, unless the work has first been recommended by the Chief of Engineers and authorized by the Secretary of the Army. In carrying out his delegated function of administering the laws enacted by Congress for the protection of navigation and navigable waters, the Secretary has issued a comprehensive set of regulations, one portion of which sets forth the requirements and conditions upon which obstructions may be placed and work may be performed in the navigable waters of the United States. 33 C.F.R. §§ 209.110-209.335 (1974).[2]

The requisite authorization from the Secretary of the Army is provided by a permit, 33 C.F.R. § 209.120 (1974), issued in the name of the Secretary by appropriate officers of the Army Corps of Engineers on such terms and conditions as may be prescribed, and without which any structure placed or work performed in the navigable waters of the United States is unlawful. 33 U.S.C. § 403. The requirement for a permit is applicable to submarine pipelines and cables

---

2. Some of these regulations were modified after the dates involved in this case. References are to the regulations as they existed up to 1974.

which obstruct the navigable capacity of the waterway where they are placed and interfere with navigation by restricting the areas where vessels may safely anchor. See 33 C.F.R. § 209.130(b)(14) (1974).

Every permit for any kind of structure or work in navigable waters is subject to a number of standard conditions, 33 C.F.R. § 209.130(c)(2) (1974), one of which is that if future operations of the United States should require, or if in the opinion of the Secretary of the Army the structure or work should cause an unreasonable obstruction to navigation, the owner shall remove or alter the structure or work without expense to the United States. 33 C.F.R. § 209.130(c)(2)(vi) (1974).

On April 12, 1965, the Department of the Army issued the permit authorizing Bell to lay a submarine telephone cable in Lake Washington. The permit was expressly made subject to the standard conditions contained in the Army regulations. The condition that bears directly on this case, which is identical to one of the standard conditions in the regulations (33 C.F.R. § 209.130(c)(2)(vii) (1974)), is contained in clause (g) of the permit issued to Bell. Clause (g) reads as follows:

> "That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage."

The cable was laid and placed in operation by Bell on or about May 1, 1965.

By 46 U.S.C. § 454, Congress authorized the Commandant of the Coast Guard to issue regulations

to promote the safety of life on navigable waters during regattas or marine parades. Among the regulations so issued is one authorizing establishment of aids to navigation by the Coast Guard to mark the course of such events. 33 C.F.R. § 62.01-35(a) (1974).

A regatta, called the Seafair Unlimited Hydroplane Regatta, is conducted each year on Lake Washington. The sponsors of the 1972 regatta furnished the Coast Guard with a detailed survey drawing of the area in Lake Washington where the regatta was to be held and where buoys were to be set. The drawing, however, did not show the location of Bell's cable here involved. On July 26, 1972, as the Coast Guard buoy tender, FIR, was putting buoy "C" into place, the buoy's anchor fouled Bell's submarine cable, causing the damage that is the subject of this action.

The action was brought by Bell invoking the admiralty and maritime jurisdiction of the federal courts, and charging the United States with negligence in issuing the Seafair chart, which had not been revised to show Bell's cable area, and charging the Coast Guard with negligence in using such a chart, although an available current chart did show the area and a local notice to mariners had set forth its location. The United States denied negligence and as an affirmative defense alleged that Bell was precluded from recovery by the terms of the very permit granting it its cable rights in Lake Washington. Bell moved for summary judgment, contending that clause (g) of the permit was inconsistent with the waiver of sovereign immunity set forth in the Public Vessels Act, 46 U.S.C. § 781,[3] and the Suits

---

3. "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage,

in Admiralty Act, 46 U.S.C. § 742.[4] The district court agreed with Bell, found negligence per se, and granted summary judgment.

[1,2] We cannot agree with the district court in its view as to the effect of the waivers set forth in the two Acts. They do grant federal jurisdiction and constitute a consent by the government to be sued, but they can hardly be said to constitute a consent to judgment in all cases. Liability remains to be proved in each case. This is similar to the rule respecting suits brought under the Federal Tort Claims Act. That statute:

> "* * * confers jurisdiction to render judgment upon * * * claims. But it does not say that all claims must be allowed. * * * Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law."

Feres v. United States, 340 U.S. 135, 140-41, 71 S.Ct. 153, 156, 95 L.Ed. 152 (1940).

The Public Vessels Act and the Suits in Admiralty Act do not purport to strip the

---

rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920."

4. "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title * * *."

government of the power to control the rights of persons to place obstructions to navigation in navigable waters of the United States. In absence of some more explicit indication of intent, the power of the United States must be held to continue unimpaired to deny permits or, in granting them, to impose conditions that are relevant to the regulatory purpose.

The effect of the condition here imposed is simply to place upon the permittee the risk of damage to the permitted structure resulting from activity of the United States that is undertaken to meet its continuing obligations respecting navigation. The condition is not, then, an outright exercise of sovereign power for the protection of the sovereign--such an exercise as might be said to have been foregone by the waiver of immunity. Rather, it is an aid to the carrying out of special duties and responsibilities imposed on the sovereign by law, and in that respect deals with problems that the very grant or permit would operate to create. It is limited in its scope to the area occupied by those responsibilities and those special problems. In our judgment it is, then, rational and relevant to the regulatory purpose and falls within the regulatory power.

This does not serve to place the United States in a position more favorable than that which a private person would occupy, contrary to the intent traditionally attributed to provisions for waiver of sovereign immunity. See Johnson, Liability of the United States for Maritime Torts, 104 U.Rich.L.Rev. 527, 529 (1976). [sic]* The private person hypothesized in these circumstances is the owner of land from whom an easement is sought by one having no power to compel a grant or demand passage. The question is whether such a private person, in his power

---

* This citation should read 10 U.Rich.L.Rev. 527, 529 (1976).

to attach conditions to an easement he was not otherwise obliged to grant, is less favored in the law than the United States is here held to be. We do not perceive that he is.

Finally, we note that holding clause (g) to be unenforceable would do more than relieve Bell of a condition it regards as improper. It would, in effect, operate to render persons incompetent to secure desired benefits by way of contract, since they could no longer effectively commit themselves to conditions they may be entirely willing to assume in order to obtain their permit. If such a result is to follow from a waiver of sovereign immunity it should, in our judgment, be by a more clear expression of legislative intent.

We conclude that clause (g) is consistent with the provisions of both the Public Vessels Act and the Suits in Admiralty Act and is within the delegated authority of the Secretary of the Army.[5]

Summary judgment is reversed. The case is remanded for further proceedings.

5. Appellant has also argued that the dominant navigational servitude of the United States, see United States v. Virginia Elec. & Power Co., 365 U.S. 624, 627-28, 81 S.Ct. 784, 5 L.Ed.2d 838 (1961); United States v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 312 U.S. 592, 596-97, 61 S.Ct. 772, 85 L.Ed. 1064 (1941); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 423-24, 61 S.Ct. 291, 85 L.Ed. 243 (1941), precludes recovery by Bell in this case. Since we have found that recovery is barred on other grounds we need not reach this issue.

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

33 USC § 1 in pertinent part:

> It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department. . . .

46 USC § 742 in pertinent part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. . . .

46 USC § 746:

> The United States or a corporation described in section 741 of this title shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

46 USC § 781:

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States for

> damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920.

46 USC § 789:

> The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

33 C.F.R. § 209.130(c)(2)(vii) (1974), referred to in this petition as "Clause (g)":

> That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

No. 76-1515

Supreme Court, U. S.
FILED
JUL 29 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1515

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 549 F. 2d 1313. The opinion of the district court (Pet. App. A) is reported at 378 F. Supp. 297.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1977. The petition for certiorari was filed on May 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a limitation on government liability contained in a permit issued by the United States Army Corps of Engineers is valid.

STATEMENT

Sometime prior to April 12, 1965, petitioner applied to the Secretary of the Army for a permit to lay a submarine cable in Lake Washington, a navigable body of water near Seattle (Pet. App. A-6). Petitioner was required to apply for the permit because the cable constituted an obstruction to navigation, and the creation of such an obstruction in navigable waters of the United States is expressly prohibited by the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403, unless authorized by the Secretary of the Army upon the recommendation of the Chief of the Army Corps of Engineers. The Secretary approved petitioner's application and issued the permit on April 12, 1965 (Pet. App. A-6). As required by 33 C.F.R. 209.130(c)(2)(vii) (1974 rev.), the permit contained a clause absolving the United States from liability for damage to the cable "which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes * * *" (Pet. 9).

Each year a regatta, called the Seafair Unlimited Hydroplane Regatta, is conducted on Lake Washington (Pet. App. A-7). The sponsors of the 1972 regatta called upon the Coast Guard to place large buoys in Lake Washington in order to mark the course (*ibid.*). The Commandant of the Coast Guard is authorized by 46 U.S.C. 454 to issue regulations to promote safety on navigable waters of the United States during regattas or marine parades, and 33 C.F.R. 62.01-35(a) specifically provides for the establishment of aids to navigation by the Coast Guard to mark the course in such events. Accordingly, the Coast Guard agreed to place buoys to mark the course of the 1972 regatta in Lake Washington, and the sponsors provided the Coast Guard with a detailed survey drawing of the area in Lake

Washington where the regatta was to be held and the buoys to be set (Pet. App. A-7). The survey did not show the location of petitioner's submarine cable (*ibid.*). On July 26, 1972, as the Coast Guard buoy tender FIR was putting one of the buoys in place, the buoy's anchor fouled petitioner's submarine cable, causing damage in the claimed amount of $56,000 (*id.* at A-5, A-7.)

After the Coast Guard refused to pay for the damage, petitioner brought this action under the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741 *et seq.*, and the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781 *et seq.*, alleging negligence (Pet. 7). The government denied negligence and, as an affirmative defense, alleged that petitioner was precluded from recovery by the express terms of the exculpatory clause in the permit granting petitioner permission to lay the submarine cable in Lake Washington (Pet. App. A-7).

The district court held that the exculpatory clause in the permit was "invalid" because it was "beyond the scope of, or in conflict with" the Suits in Admiralty Act and the Public Vessels Act, "which were designed to subject the United States to maritime tort liability to the same extent as a private person" (Pet. App. A-2 to A-3), and granted summary judgment for petitioner.

The court of appeals reversed (Pet. App. A-4 to A-10). The court observed that "[t]he Public Vessels Act and the Suits in Admiralty Act do not purport to strip the government of the power to control the rights of persons to place obstructions to navigation in navigable waters of the United States. * * * [T]he power of the United States must be held to continue unimpaired to deny permits or, in granting them, to impose conditions that are relevant to the regulatory purpose" (Pet. App. A-8 to A-9). It concluded that the exculpatory clause at issue

in this case was "rational and relevant to the regulatory purpose and falls within the regulatory power" (Pet. App. A-9) and, accordingly, was valid.

ARGUMENT

The decision of the court of appeals is correct and is in accord with that of the only other court of appeals to have considered the issue. See *Boston Edison Co.* v. *Great Lakes Dredge & Dock Co.*, 423 F. 2d 891 (C.A. 1). Review by this Court is not warranted.

1. Petitioner contends (Pet. 11-12, 18-19) that the exculpatory clause at issue here is inconsistent with the general waiver of sovereign immunity contained in both the Public Vessels Act, 46 U.S.C. 781, and the Suits in Admiralty Act, 46 U.S.C. 742. There is no conflict. The waivers of immunity in those Acts remove a jurisdictional defense that the sovereign otherwise could assert, but they leave intact the government's right to assert substantive defenses on the question of liability. See *Feres* v. *United States*, 340 U.S. 135, 140-141.

Petitioner suggests, however, that these statutes express a public policy at odds with the contested clause. But the statutes affirmatively provide that the United States is "entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels" (46 U.S.C. 746), and they limit recovery to that which could be had if "a private person or property were involved" (46 U.S.C. 742). See also *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600; *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 228; *McMahon* v. *Pan American World Airways, Inc.*, 297 F. 2d 268, 269 (C.A. 5). The Acts look toward placing the United States in the same position as private litigants. There is no suggestion that the United States must go further and leave itself open to liability in situations where private persons would be permitted to limit their liability. Since private persons could condition the grant of an easement by limiting their liability for damage done by them to property installed on the easement,[1] there is no reason why the United States should not be permitted to do likewise. To the contrary, it is established that, in cases arising under analogous provisions of the Tort Claims Act, the United States may obtain, or benefit from, releases of liability. See *Montellier* v. *United States*, 315 F. 2d 180 (C.A. 2); *Matland* v. *United States*, 285 F. 2d 752 (C.A. 3).

2. Petitioner contends (Pet. 12, 17-18), however, that regardless of the United States' general authority to limit its liability, the limitation of liability at issue here was in excess of the Secretary of the Army's authority to insure the safety of navigable waters.

The Secretary of the Army is required in 33 U.S.C. 1 "to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement * * *." Pursuant to this direction, and to his authority under the Rivers and Harbors Act of 1899, 33 U.S.C. 403, to issue permits for structures built in the navigable waters of the United States,

---

[1]Petitioner asserts that the analogy to a private landowner is faulty because the government does not have a fee simple title to the river bottom but only regulates in the exercise of its dominant navigational servitude. The exact extent of the government's legal interest is, however, immaterial. Since petitioner admits that it was required to obtain a permit (Pet. 5), it can hardly argue that no vehicle exists to which conditions may be attached. See generally *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 423-428 (government has broad authority to attach conditions to permits issued pursuant to the federal power over navigable rivers).

the Secretary has issued regulations setting forth the requirements and conditions upon which obstructions may be placed, and work may be performed, in navigable waters, including the requirement that all permits include the condition at issue in this case.

The United States may carry out operations with regard to its responsibilities on navigable rivers, including operations directed at aiding navigation, such as the buoy-mooring that fouled petitioner's cable in this case. The grant of permission to place structures in such waters, and the actual placing of the structures, creates the possibility that the government's operations may be hindered by, or interfere with or damage, those structures. Regulations allocating the risks created by the permit are proper, as the court of appeals noted, to "deal[ ] with problems that the very grant or permit would operate to create".[2] Further, the particular manner in which the Secretary chose to allocate the risks has not been shown to be contrary to the legislative intent. Accordingly, the regulations are "rational and relevant to the regulatory purpose and fall[ ] within the regulatory power" (Pet. App. A-9).

---

[2]Petitioner suggests (Pet. 20) on the basis of two cases, *Kelly* v. *United States*, 531 F. 2d 1144, 1148-1149 (C.A. 2), and *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140, 145 (C.A. 5), that those circuits would decide this issue differently from the court of appeals below. The language petitioner considered significant in *Kelly* — that the Suits in Admiralty Act must be given its "plain and ordinary meaning" — merely enunciated a general principle of construction; *Kelly* dealt with the unrelated question whether admiralty jurisdiction extends to a pleasure-vessel accident. Similarly, the dictum in *De Bardeleben* on which petitioner relies, which stated generally the intent of the Suits in Admiralty Act, did not address the question here but rather the quite different question whether the statutory exceptions to the Tort Claims Act are imported into the Suits in Admiralty Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.